IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELALTE SIDE

APPEAL FROM ORDER NO.953 OF 2004
WITH
CIVIL APPLICATION NO. 1320 OF 2004

Fiza Kamruddin Lokhandwala. ...Appellant.
Vs.
Maharashtra Housing and Area Development Board & Ors. ...Respondents.

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Mr. M.S. Kadu for the Appellant.
None for the Respondent.

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CORAM : DR. D.Y. CHANDRACHUD, J.

December 13, 2005.

P.C.:

This Appeal from Order is directed against an order dated 5th October 2004 passed by the Learned Trial Judge in the City Civil Court declining to restore a suit that came to be dismissed in default. The Motion taken out by the Plaintiff for the restoration of the suit was dismissed by the impugned order. The suit instituted by the Appellant seeks a declaration that the Appellant alone is entitled to the allotment of a tenement, Tenement No.41 in Building No.111/113, at Huria Street, Mumbai-

400 008. The Appellant has also sought a declaration that the judgment and order of the City Civil Court in S.C. Suit No.739 of 1991 which was instituted by the Fourth Respondent was not binding on the Appellant who was not party to the suit. A permanent injunction has been sought against Respondent No.1 to 3, restraining them from dispossessing the Appellant and the members of his family from the possession of the suit premises.

2. The suit was instituted on 29th August 2002 and in the Motion taken out by the Appellant, an ad-interim order was passed on 9th September 2002. The Motion was made absolute on 2nd May 2003. Parties were directed to complete inspection and the suit was adjourned for recording evidence. Issues have been drawn up and settled and the Appellant was directed to file her evidence in the form of an affidavit in lieu of the Examination-in-Chief. On 5th August 2003, the affidavit of documents was taken on file. On 29th August 2003, the suit came to be adjourned for recording of evidence. On 5th January 2004, the documents were marked as exhibits and the suit was adjourned for cross-examination. On 21st February 2004, the Advocate for the Plaintiff applied for an adjournment. However, considering the age of the

Fourth Defendant, the adjournment application was rejected and the suit came to be dismissed in default. The Appellant thereupon took out a motion for restoration of the suit and for setting aside the order of dismissal in default. That motion has been dismissed by the impugned order. The Learned Trial Judge has noted that the Fourth Defendant is of 84 years of age and that the suit has been adjourned earlier. The Court observed that there was no sufficient ground for the Appellant to keep away from the Court.

3. In the affidavit in support of the Notice of Motion, it has been stated that the suit was listed on Board on 23rd February 2004 and the Appellant had filed her affidavit in lieu of Examination-in-Chief. However, the Appellant was in Dubai on the occasion of Moharrum to attend a religious programme of His Holiness Dr.Syedna Mohamed Burhanuddin. It is stated that the Learned Advocate appearing on her behalf applied for time on 21st February 2004. The Learned Advocate was present before the Court but the suit was dismissed in default.

4. Notices have been issued to the Respondents and there is an office noting that all the Respondents are duly served.

5. Having considered the explanation of the Appellant, I am of the view that it would have been appropriate if the suit was restored subject to the payment of costs by the Appellant to the Fourth Defendant. The record would not disclose that the Appellant had been negligent in pursuing the suit. The conduct of the Plaintiff is not such as would lead to an inference of an abandonment of the claim. One of the circumstances which weighed with the Trial Court in dismissing the motion is the advanced age of the Fourth Respondent. I am of the view that the ends of justice would be served if the Appellant is directed to pay costs to the Fourth Respondent as a condition precedent and directions are issued to the effect that the parties shall cooperate in the expetitious trial of the suit. Accordingly, the Appeal is allowed. The order of the Trial Court dated 6th October 2004 is quashed and set aside. The Notice of Motion is made absolute in terms of prayer clause (a). The interim order shall revive upon the restoration of the suit. This shall, however, her conditional on the Appellant paying to the Fourth Respondent costs quantified at Rs.7,500/- which shall be a condition precedent and shall be paid within a period of one week from today. In the event that costs are

paid within the period stipulated, the suit shall stand restored. Parties shall appear before the Learned Trial Judge for receiving directions on 9th January 2006 so that a time schedule can be set down for the disposal of the suit.

6. In view of the disposal of the appeal, the Civil Application does not survive and is accordingly disposed of.

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